ORIGINAL

Supreme Court, U.S.
FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-5014 and 88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, 28 U.S.C. 631 et seq., permits a district court to delegate jury selection to a federal magistrate.

2. Whether a district court's delegation of jury selection to a federal magistrate violates Article III of the Constitution.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-5014

JOSE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-5158

DIEGO CHAVEZ-TESINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Supp. Pet. App. 1a-15a) is reported at 848 F.2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1988. A petition for rehearing was denied on August 4, 1988 (Supp. Pet. App. 16a). The petition for a writ of certiorari in No. 88-5014 was filed on July 5, 1988, and the petition for a writ of certiorari in No. 88-5158 was filed on July 22, 1988. A supplemental petition for a writ of certiorari in both cases was filed on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. (& Supp. IV) 841(a)(1), and conspiring to do the same, in violation of 21 U.S.C. 846. Petitioner Chavez-Tesina was also convicted of conducting a narcotics racketeering enterprise in violation of 18 U.S.C. 1962(c), and interstate travel in aid of racketeering, in violation of 18 U.S.C. (& Supp. IV) 1952. Petitioner Gomez was sentenced to a total of ten years' imprisonment and a ten-year special parole term. Petitioner Chavez-Tesina was sentenced to a total of 20 years' imprisonment and a lifetime term of special parole. The court of appeals affirmed (Supp. Pet. App. 1a-15a).

1. Prior to petitioners' trial, the district court assigned the task of jury selection to a magistrate pursuant to a local rule conferring upon magistrates the authority to discharge the duties set forth in the Federal Magistrates Act, 28 U.S.C. 631 et seq. Petitioners and a co-defendant objected to that delegation at the beginning of jury selection, and their co-defendant renewed his objection after the jury had been selected (Supp. Pet. App. 18a-19a). The district court upheld the delegation but offered petitioners and their co-defendant de novo review of any challenges to jurors for cause. Because the only juror challenged for cause was excused by consent, petitioners and their co-defendant had no occasion to request review by the district court. Id. at 4a.

2. The court of appeals affirmed (Supp. Pet. App. 1a-15a). The court concluded that, consistent with both the Federal Magistrates Act and the Constitution, a district court may delegate jury selection to a magistrate. The court found that Section 636(b)(3) of the Federal Magistrates Act, which allows district courts to assign magistrates "such additional duties as

are not inconsistent with the Constitution and laws of the United States," was broad enough to encompass the delegation of jury selection (Supp. Pet. App. 5a-6a). The court rejected petitioners' contention that Congress intended to allow magistrates to be assigned only pretrial matters (id. at 5a). The court also rejected petitioners' assertion that by requiring the parties' consent to the delegation of misdemeanors and civil trials to magistrates, Congress intended to allow the delegation of jury selection only with the parties' consent (ibid.).

The court of appeals next held that the delegation of jury selection to magistrates does not violate the Constitution (Supp. Pet. App. 7a-9a). According to the court, jury selection can be delegated to a non-Article III judge without violating Article III, because "the delegation of authority occurs entirely within the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch encroaching upon the power of another" (id. at 8a (emphasis in original; citation omitted)). The court also concluded that where, as in this case, an Article III judge retains the authority to review the magistrate's decision, delegation would not offend the Constitution even if jury selection were deemed "inherently judicial" and thus nondelegable (id. at 8a-9a). Finally, the court rejected petitioners' claim that Article III requires the presence of an Article III judge during jury selection (Supp. Pet. App. 9a-10a).

Judge Oakes dissented (Supp. Pet. App. 14a-15a). He concluded that jury selection by federal magistrates "raises serious constitutional questions" that are not adequately answered by permitting subsequent de novo review of jury challenges by the district court (id. at 14a). Judge Oakes also contended that the delegation of jury selection to magistrates is a bad practice because it distances the district judge presiding over the trial from the jury (id. at 14a-15a).

ARGUMENT

Petitioners contend that the delegation of jury selection to a magistrate violates the Federal Magistrates Act and the Constitution. They also argue that the decision of the court of appeals in this case conflicts with decisions of other courts of appeals and, accordingly, warrants this Court's review. We believe that the court of appeals correctly rejected petitioners' claims. Because, however, the decision of the court of appeals conflicts with a decision of another court of appeals and concerns a question of substantial importance to the federal criminal justice system, we agree that the petitions should be granted.

1. The Second Circuit's decision in this case conflicts with the Fifth Circuit's decision in United States v. Ford, 824 F.2d 1430 (1987) (en banc), cert. denied, No. 87-5570 (Jan. 19, 1988), 1/ in which the Fifth Circuit held that the Federal Magistrates Act does not authorize district courts to delegate jury selection to magistrates. The court concluded that a contrary construction "would pose grave constitutional issues" (id. at 1435). The court upheld the defendant's conviction in Ford only because the defendant had not objected to the delegation, and the claim was held not to amount to plain error. Four judges dissented from the statutory ruling on the ground that in their view jury selection by magistrates offended neither the Magistrates Act nor the Constitution (see id. at 1440 (Rubin, J., dissenting)).

The Second Circuit in this case disagreed with the Fifth

1/ In our opposition last Term to the petition for a writ of certiorari in Ford (No. 87-5570), a copy of which has been provided to petitioners, we advised the Court that the authority of magistrates to conduct jury voir dire proceedings in federal criminal cases is an important issue that would likely warrant the Court's review. We nonetheless opposed its review in that case because the petitioner had failed to preserve her claim in the district court and because no court had (or has) held that such a claim is cognizable under the plain error standard.

Circuit's holding in Ford and concluded that the Magistrates Act does permit the delegation of jury selection to a federal magistrate (see Supp. Pet. App. 5a-7a). The Ninth Circuit has likewise upheld a district court's delegation of jury selection to a magistrate, but only if the district court retains de novo review of the magistrate's decisions. See United States v. Peacock, 761 F.2d 1313, 1317-1319 (9th Cir.), cert. denied, 474 U.S. 847 (1985); United States v. Bezold, 760 F.2d 999, 1001-1003 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986); see also United States v. Rivera-Sola, 713 F.2d 866, 872-873 (1st Cir. 1983) (stating in dictum that the delegation of jury selection is lawful).

This case also presents a proper vehicle for reaching the lawfulness of the delegation of jury selection to a magistrate. In this case, unlike in Ford, petitioners timely objected to the delegation of jury selection (see Supp. Pet. App. 4a, 18a-19a). Consequently, the statutory and constitutional questions are not encumbered by the question whether the delegation amounts to plain error. In addition, the court of appeals has fully considered and addressed both the statutory and constitutional dimensions of jury selection by magistrates. 2/

2. Unlike petitioners, we believe that the court of appeals correctly determined that the Federal Magistrates Act authorizes the delegation of jury selection to magistrates and that Article III of the Constitution does not forbid that practice. The court of appeals' analysis is consistent with our general view and with

---

2/ Although petitioner Chavez-Tesina's "questions presented" in his initial petition do not expressly raise the statutory issue separately from the constitutional issue (see 88-5158 Pet. (i)), the petition itself makes clear that he is raising both questions (see, e.g., id. at 12 ("Simply put, whatever the power of Congress may be, this Court must not be persuaded that Congress intended that 'additional duty' include presiding over jury selection in felony cases."). In addition, the supplemental petition for a writ of certiorari filed jointly by petitioners clearly raises both the statutory and constitutional questions (see Supp. Pet. (i)).

the views expressed by the dissenting judges in Ford and the Ninth Circuit in Bezold and Peacock.

First, we believe that the authority to conduct jury voir dire falls within the powers granted to magistrates in the Federal Magistrates Act, 28 U.S.C. 636. Section 636(b) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." Congress intended this broad grant of authority to "enable[] the district courts to continue innovative experimentation in the use of this judicial officer. * * * [P]lacing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates." S. Rep. 94-625, 94th Cong., 2d Sess. 10 (1976); see also H.R. Rep. 94-1609, 94th Cong., 2d Sess. 12 (1976).

Authority for magistrates to conduct voir dire can also be found in the provision of the Magistrates Act that states that "a [district] judge may designate a magistrate to hear and determine any pretrial matter pending before the court" (28 U.S.C. 636(b)(1)(A)). As the Senate Report explains, that provision was intended to authorize magistrates to perform the functions enumerated by Chief Judge Belloni of the District Court for the District of Oregon in his submission to the Senate committee. See S. Rep. 94-625, supra, at 7; H.R. Rep. 94-1609, supra, at 9. Significantly, Judge Belloni described to the Senate Judiciary Committee the functions performed by the magistrate in his district, including "presid[ing] over the voir dire and jury selection of a trial to begin momentarily before a [district judge]." Jurisdiction of United States Magistrates: Hearing on S. 1283 Before a Subcomm. of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 39 (1975).

Second, magistrate-conducted voir dire does not violate Article III of the Constitution. As the court of appeals

observed, "[t]he Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection" (Supp. Pet. App. 8a). Here, as in United States v. Raddatz, 447 U.S. 667 (1980), in which this Court rejected a similar constitutional challenge to the Magistrates Act, 3/ Article III was not offended because the magistrate's actions with respect to voir dire occurred "under the district court's total control and jurisdiction" (447 U.S. at 681). Indeed, the district court judge offered petitioners and their co-defendant de novo review of any challenges to jurors for cause that were not sustained by the magistrate. Petitioners, however, declined the offer because the magistrate did not deny any such challenge.

Petitioners' constitutional claim is presented therefore in its starkest form. They do not (and cannot) claim any concrete prejudice from the practice employed in this case. Instead, they must argue that the absence of an Article III judge at voir dire violates Article III even in the absence of any possibility of prejudice. As the court of appeals explained (Supp. Pet. App. 9a), however, an Article III judge need not preside over all facets of a federal criminal proceeding. See Palmore v. United States, 411 U.S. 389, 402 (1973) (citations omitted) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protection prescribed for federal judges in Art. III."); Swain v. Pressley, 430 U.S. 372, 382-383 (1977) (footnote omitted) ("[T]he Constitution does not require that all persons charged with federal crimes be tried in Art. III courts."). For example, an arrested person typically makes his initial

---

3/ In Raddatz, the Court rejected a due process challenge to the provision of the Magistrates Act authorizing a district court both to refer to a magistrate a motion to suppress evidence and to rule on the motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations.

appearance before a magistrate (Fed. R. Crim. P. 5); a magistrate may determine various pretrial motions in criminal cases (28 U.S.C. 636(b)(1)(A)); and a magistrate may conduct hearings and make recommendations to a district court regarding other motions, such as motions to dismiss indictments and to suppress evidence (28 U.S.C. 636(b)(1)(B)). We believe that a magistrate's conducting of voir dire is likewise not precluded by Article III.

CONCLUSION

The petitions for a writ of certiorari should be granted and the cases consolidated for purposes of oral argument and disposition.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

NOVEMBER 1988